

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in November 2008

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: DEFAULT; LEVEL ONE

CASE STYLE: REDD v. MCDOWELL COUNTY BOARD OF EDUCATION AND
DEPARTMENT OF EDUCATION

DOCKET NO. 2009-0451-MCDEDDEF (11/25/2008)

PRIMARY ISSUES: Whether Grievant is entitled to a hearing on a claim of default because the Respondent did not agree to waive proceedings to level three.

SUMMARY: Grievant asserts she is entitled to a default hearing because the Respondent did not agree to waive proceedings to level three. While the response from the Respondent was not a desired response to Grievant's request to proceed directly to level three, it is not a required response as set out in the default statute. Grievant's request for a hearing on the merit of default is DENIED.

KEYWORDS: DISCRIMINATION; FAVORITISM

CASE STYLE: NELSON, ET AL. v. BOONE COUNTY BOARD OF EDUCATION

DOCKET NO. 08-03-003 (11/14/2008)

PRIMARY ISSUES: Whether Grievants were discriminated against when they could not agree on an alternative time for the principal-led professional development and Respondent would not allow them to substitute additional continuing education hours when support personnel were allowed to, thus letting Grievants leave two hours early on December 22, 2006.

SUMMARY: Grievants assert they were discriminated against when they were not given the same opportunity as other employees to leave two hours early on December 22, 2006, a previously designated educational support and enhancement (hereinafter referred to as an ISE) day. Grievance denied.

KEYWORDS: NON-SELECTION; STANDING; SUBSTITUTE; CITIZEN COACH; HIRING

CASE STYLE: MASCARO v. MARION COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-0299-MRNE (11/24/2008)

PRIMARY ISSUES: Whether Grievant is an “employee” for purposes of standing to file a grievance.

SUMMARY: Grievant, a substitute employee, was not hired for a coaching position that was given to a citizen coach. Respondent asserted that Grievant was not an “employee” within the meaning of the Grievance Procedure, and so had no standing to dispute the hiring result by filing a grievance. Respondent proved this affirmative defense, and so the grievance is denied.

KEYWORDS: TIMELINESS, NON-SELECTION, DISCOVERY RULE, GRIEVABLE EVENT

CASE STYLE: BAILEY v. MCDOWELL COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION
DOCKET NO. 07-33-399 (11/24/2008)

PRIMARY ISSUES: Whether a grievance is timely filed where the Grievant fails to inquire into the underlying facts of his non-selection for a period of five years?

SUMMARY: Grievant alleges that the WVDOE erred when it failed to select him for the position of Assistant Superintendent in 2002. Grievant claims that the WVDOE hired an individual without the proper certification or licensure.
Respondents argue that this Grievance was not timely filed because the Grievant knew or should have known of the grievable event at the time of the 2002 hiring. Respondents further argue that there was no requirement that an Assistant Superintendent hold a particular certification or licensure.
This grievance, as filed in 2007, was not timely filed as the Grievant knew or should have known of the grievable event in 2002. The merits of this grievance need not be reached. This grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	BACK-PAY, EXTRA-DUTY ASSIGNMENT, SPECULATIVE, BUS SHED
<u>CASE STYLE:</u>	<u>GOODSON, ET AL. v. FAYETTE COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-10-129 (11/6/2008)
<u>PRIMARY ISSUES:</u>	Whether Grievants are entitled to back-pay where the Respondent BOE permitted two bus operators to build bus sheds?
<u>SUMMARY:</u>	<p>Grievants argue that Respondent BOE failed to properly post two assignments in the fall of 2006. They allege the Respondent BOE permitted two bus operators to build and move bus sheds without posting the assignments, as required by law. As relief, Grievants seek back-pay plus interest.</p> <p>Respondent argues that the Grievants cannot establish that any Grievant would have been awarded an assignment if the assignments were posted.</p> <p>The Respondent was not required to post the assignments. The Grievants cannot establish that they were within the particular category of employment to perform the assignments. Therefore, this grievance is denied.</p>

<u>KEYWORDS:</u>	RIF, REDUCTION IN FORCE, PREFERRED RECALL LIST, EXTRACURRICULAR ASSIGNMENT, CONTINUES TO EXIST
<u>CASE STYLE:</u>	<u>GRAHAM, ET AL. v. WOOD COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2008-0261-CONS (11/20/2008)
<u>PRIMARY ISSUES:</u>	Whether the BOE erred when it failed to utilize a preferred recall list when it reduced its force of extracurricular bus operators?
<u>SUMMARY:</u>	<p>Grievants maintain that the BOE violated West Virginia law because it failed to utilize a preferred recall list when reassigning extracurricular bus assignments after realigning and economizing bus routes. In addition, Grievants argue that the BOE has a pattern and practice of using a preferred recall list and it must continue to follow this pattern and practice. As relief, they request that the BOE be forced to utilize a preferred recall list. Additionally, Grievants seek back pay. Respondent BOE argues that it was not required to adopt a preferred recall list so long as it hired bus operators with the most seniority, in accordance with West Virginia Code §18A-4-8b.</p> <p>The BOE is not required to utilize a preferred recall list where extracurricular assignments are reduced for lack of need. West Virginia Code §18A-4-16(6) applies and it does not require the utilization of a preferred recall list as provided for in West Virginia Code §18A-4-8b. However, it does require that a bus operator be offered his or her extracurricular assignment if the assignment continues to exist or is reestablished in a subsequent year. This grievance is denied.</p>

<u>KEYWORDS:</u>	TIMELINESS; REPRISAL; ELIMINATION OF POSITION; POSTING; ABANDONMENT
<u>CASE STYLE:</u>	<u>TONEY v. LINCOLN COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2008-0535-LINED (11/7/2008)
<u>PRIMARY ISSUES:</u>	Whether Respondent engaged in reprisal against Grievant in eliminating a supplemental bus run for gifted students.
<u>SUMMARY:</u>	<p>A supplemental bus run was posted by the Respondent on August 31, 2006, to transport two students in the gifted program from the Hamlin Elementary-Middle School to the Lincoln County High School and back each day. Grievant is more senior than Mr. Nelson. Grievant expressed an interest in applying for the supplemental bus run to the assistant superintendent. During the time of the posting, one of the parents of the two gifted students indicated that the parent intended to be responsible for transporting the students to and from Lincoln County High School. As a result, there was no longer a need for the bus to transport the students. Grievant asserts that the supplemental bus run transporting the students in the gifted program was cancelled to keep him from getting the position in retaliation for his history of filing grievances against the Respondent. Grievant failed to prove that this was an act of reprisal. Respondent had a legitimate reason for eliminating the bus assignment position. This grievance is DENIED.</p>

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	CLASSIFICATION, REALLOCATION
<u>CASE STYLE:</u>	<u>POOLE, III v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL AND DIVISION OF PERSONNEL</u> DOCKET NO. 07-HHR-347 (11/7/2008)
<u>PRIMARY ISSUES:</u>	Whether the Grievant was properly classified as a Housekeeper, Lead, when his duties were of an active-worker, supervisory nature.
<u>SUMMARY:</u>	<p>Grievant claims his position is misclassified as a Housekeeper, Lead, and should be properly classified as Supervisor 1. Respondent DOP maintains that the Housekeeper, Lead, classification is the "best fit" for the Grievant's position.</p> <p>The duties of the Grievant's position indicate that he is taking an active role in the work he is supervising. When compared to the other classification at issue, the Housekeeper, Lead, classification is the "best fit."</p> <p>For the reasons set-forth below, this grievance is denied.</p>

<u>KEYWORDS:</u>	MISCLASSIFICATION, TIMELINESS, CLEARLY WRONG
<u>CASE STYLE:</u>	<u>NICHOLSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND DIVISION OF PERSONNEL</u> DOCKET NO. 07-HHR-210 (11/20/2008)
<u>PRIMARY ISSUES:</u>	Whether Division of Personnel's classification of the COO position as an Administrative Services Manager 4 (ASM 4) was clearly wrong? Whether the grievance was timely filed?
<u>SUMMARY:</u>	<p>Since this is a misclassification, it is a continuing occurrence and grievant may file it any time (but only once) while he is in the position. The grievance was timely filed.</p> <p>Grievant contends that the position in which he is presently serving in an "acting" capacity is misclassified. The Deputy Secretary for DHHR submitted the new position of COO, to DOP. It was given an ASM 4 classification rather than the HHR OD 3 classification that was requested. Therefore, the position was placed in pay grade 22 rather than pay grade 23. Grievant believes the position should be classified so that it would qualify for a pay grade 25. Grievant must prove, by a preponderance of the evidence, that the work he is doing is a better fit in a different classification than the one Grievant is currently in. Additionally, DOP's interpretation and application of the classification specifications at issue are given great weight unless clearly erroneous. Because Grievant was unable to prove that the COO position does not fit the ASM 4 classification and because the evidence does not demonstrate that DOP's determination was clearly wrong, this grievance must be DENIED.</p>

KEYWORDS: PROBATIONARY EMPLOYEE, SATISFACTORY PERFORMANCE, UNSATISFACTORY PERFORMANCE

CASE STYLE: COSBY v. DIVISION OF JUVENILE SERVICES/GENE SPADARO JUVENILE CENTER

DOCKET NO. 2009-0086-MAPS (11/13/2008)

PRIMARY ISSUES: Whether the DJS improperly dismissed the probationary correctional officer for unsatisfactory performance?

SUMMARY: DJS dismissed Grievant during her initial one year probationary period of employment. Grievant was employed as a probationary Correctional Officer 1. DJS counseled the Grievant numerous times about her work performance. Specifically, the Grievant was not following policy and procedures. Grievant claims that the Respondent erred in failing to follow progressive discipline. Further, she maintains that she was treated unfairly.

Probationary employees may be dismissed at any time for unsatisfactory job performance. The Grievant has failed to meet her burden of proving that her performance was satisfactory. This grievance is denied.

KEYWORDS: REALLOCATION, FAIR AND EQUITABLE, MAKE WHOLE

CASE STYLE: PERRY, ET AL. v. DIVISION OF JUVENILE SERVICES AND DIVISION OF PERSONNEL

DOCKET NO. 07-DJS-343 (11/7/2008)

PRIMARY ISSUES: Whether Grievants are entitled to equitable relief for Respondents failure to provide them with an opportunity to meet the qualifications for reallocation?

SUMMARY: By the time all Grievants had completed their one year of service as Correctional Officer I they had all completed their forty hours in service requirement and had been ready and available to complete the Service Academy requirement. Through no fault of the Grievants the DJS failed to schedule dates for Grievants to attend the Academy during their first year of service. Grievants allege that they should not be denied an advancement in their classification because the DJS failed to give them the opportunity to meet the requirements for reallocation. Grievants ask that their grievance be granted pursuant to the authority of the Grievance Board Administrative Law Judges to grant "fair and equitable" relief. Given the specific facts of this set of grievances they are GRANTED.

KEYWORDS: RESIDENT ABUSE; HEARSAY; CREDIBILITY

CASE STYLE: WARNER v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL
DOCKET NO. 07-HHR-409 (11/18/2008)

PRIMARY ISSUES: Whether Respondent proved the charges of resident abuse?
Whether the hearsay presented was entitled to any weight?

SUMMARY: Grievant was dismissed from her employment as a Health Service Assistant at Lakin Hospital for resident abuse. No witnesses to the alleged resident abuse were called to testify in this proceeding. The only evidence of abuse was the testimony of the investigator, and her report summarizing her interviews with staff and residents. This is hearsay. Under the circumstances presented here, this hearsay is entitled to no weight. Respondent did not prove the charges against Grievant. Grievance GRANTED.

KEYWORDS: SALARY; INCREASE; DISCRETIONARY; MORATORIUM; PUCCIO MEMORANDUM; PAY PLAN IMPLEMENTATION POLICY

CASE STYLE: KELLY v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HOPEMONT HOSPITAL AND DIVISION OF PERSONNEL
DOCKET NO. 07-HHR-109 (11/14/2008)

PRIMARY ISSUES: Whether Grievant should receive a salary increase?

SUMMARY: Grievant alleges that he receives a lower salary than most other employees in his classification at Hopemont Hospital, and some make over 20% more than he does. Grievant's salary is partially the result of a break in his employment that occurred because of a layoff, and his return to Hopemont in a different classification at a much lower salary. Other employees in his classification have had continuous, uninterrupted employment, accounting for their higher salaries. Grievant argues that he should receive a salary increase pursuant to the "internal equity" provision of the Division of Personnel's Pay Plan Implementation Policy. However, such raises are requested at the employer's discretion, and they are not required. Grievant also contends that the Governor's Office moratorium on discretionary pay increases has been applied unfairly, but no party to the instant grievance has been involved in the conduct alleged. Grievance DENIED.

KEYWORDS:

SALARY; PAY; INCREASE; REALLOCATION; DISCRIMINATION; FAVORITISM; PAY PLAN IMPLEMENTATION; GOVERNOR'S MORATORIUM; PUCCIO MEMORANDUM

CASE STYLE:

LANE v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS

DOCKET NO. 2008-0469-DOT (11/20/2008)

PRIMARY ISSUES:

Did the employer engage in discrimination and favoritism by granting a similarly situated employee two separate 15% salary increases, when Grievant only received one pay increase upon reallocation?

SUMMARY:

Grievant is an employee of the Division of Highways in the Engineering Technician series of classifications. Such employees begin as trainees, then are reallocated to higher classifications upon completion of a certification program offered through Fairmont State College. Grievant was promoted to the Transportation Engineering Technician classification, the highest in the series, after completing the required training program, a classification which was six pay grades higher than his initial classification. However, although Grievant's district administrator assumed he would receive a 30% pay increase, representing 5% per pay grade, DOP Rules and Policy only allowed him to receive a 15% increase.

A few months after Grievant's reallocation, another DOH employee who had begun employment at the same time, in the same classification and with the same qualifications, became eligible for reallocation. In order to avoid Grievant's situation, DOH administrators first reallocated him to an intermediate classification, then later reallocated him to the Technician classification, resulting in two separate 15% pay increases. This resulted in discrimination and favoritism, because Grievant was similarly situated and did not receive the benefit of the additional 15% pay increase, and the decision was not based upon any differences in job duties of the two employees. Grievance GRANTED.

KEYWORDS: SUSPENSION, USE OF FORCE

CASE STYLE: STACY v. DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER
DOCKET NO. 2008-0280-MAPS (11/14/2008)

PRIMARY ISSUES: Whether Grievant was properly suspended for an isolated use of force against an inmate.

SUMMARY: Grievant is employed as a Substance Abuse Therapist at the Anthony Correctional Center, a correctional facility designed to house and treat youthful criminal offenders. Grievant intervened and used physical force in a situation, where five other employees were present, with no less than three of the employees closer to the offender than Grievant. Evidence of record does not demonstrate the physical force used was justified, reasonably provoked and/or needed at the point that it was initiated and administered. The use of physical force solely because an inmate is verbally rude, loud or argumentative is unacceptable. There is no evidence that either the investigation or suspension was motivated by any bias against Grievant. Grievant's actions were in violation of applicable Policy Directives. Grievance DENIED.

KEYWORDS: SUSPENSION; MITIGATION

CASE STYLE: GAY v. DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTE
DOCKET NO. 2008-1706-MAPS (11/19/2008)

PRIMARY ISSUES: Whether Grievant was properly suspended due to repeated policy violations.

SUMMARY: Grievant is employed as a Recreation Director at the Anthony Correctional Center. Despite repeated counseling by the administration of the Anthony Correctional Center, Grievant had the unfortunate tendency of misplacing and/or losing her keys. The resulting searches involved multiple hours of employees' time and cost to the Center. In addition, these actions compromised security at the facility by giving inmates potential access to the keys. This pattern of Grievant's failure to adhere to the Center's key control rules led the Warden to suspend Grievant for three working days. Grievant does not dispute that she mishandled her keys. Grievant failed to make the necessary showing that the disciplinary measure was so clearly disproportionate to the employee's offense that it indicated an abuse of discretion. The requested mitigation of the is denied. This grievance is denied.

KEYWORDS: SUSPENSION; MITIGATION

CASE STYLE: VEST v. DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX
DOCKET NO. 2009-0024-MAPS (11/25/2008)

PRIMARY ISSUES: Whether Grievant was properly suspended due to inappropriate conduct.

SUMMARY: Grievant is employed as a Supervisor 1 at the Mount Olive Correctional Complex. On April 24, 2008, Grievant was working in the State Shop of the facility with a subordinate employee, Arietta King. A contraband DVD containing pornographic images was brought to the State Shop from the prison Magistrates' office for destruction. Instead of destroying the DVD, Ms. King and Grievant utilized a play station to view the DVD. Grievant acknowledged that she was aware of policies concerning appropriate conduct prohibiting the viewing of pornographic material at the workplace. Respondent proved the charges against Grievant by a preponderance of the evidence. Grievant failed to make the necessary showing that the disciplinary measure was so clearly disproportionate to the employee's offense that it indicated an abuse of discretion. The requested mitigation of the five-day suspension is denied. The grievance is denied.

KEYWORDS: SUSPENSION; PROGRESSIVE DISCIPLINE; MITIGATION

CASE STYLE: BROWN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES
DOCKET NO. 2008-1299-DHHR (11/24/2008)

PRIMARY ISSUES: Should Grievant have been suspended for failing to conduct required interviews and falsifying records to reflect that he did?

SUMMARY: Grievant was suspended for ten days after it was discovered that he was not conducting federally-mandated interviews required when food stamps cases are reviewed at 24 months, yet entering log information indicating that the reviews had been completed. He admitted he engaged in the conduct alleged and knew he was required to conduct the interviews, but alleged that a ten-day suspension was too harsh and that Respondent failed to follow its progressive discipline policy.
☐ Policy Memorandum 2104 does not require that progressive discipline be followed in every case, and a suspension is permitted for a serious, singular incident. It was within Respondent's discretion to suspend Grievant for conduct which was serious in nature, with potential financial consequences for his employer. Grievant did not demonstrate that mitigation was required. Grievance DENIED.

KEYWORDS: TERMINATION; PROBATIONARY EMPLOYMENT;
UNSATISFACTORY PERFORMANCE

CASE STYLE: BUSH v. DEPARTMENT OF TRANSPORTATION/DIVISION OF
HIGHWAYS
DOCKET NO. 2008-1489-DOT (11/12/2008)

PRIMARY ISSUES: Whether Respondent should have terminated Grievant's
probationary employment for unsatisfactory performance?

SUMMARY: Grievant's probationary employment was terminated, due to DOH's
determination that his performance was unsatisfactory, specifically
with regard to properly performing his duties and taking direction from
his foremen. When a probationary employee is terminated, it is his
burden to prove his services were satisfactory. In this case, Grievant
failed to meet this burden, and the evidence supported the
conclusion that Grievant repeatedly failed to follow proper procedures
for performing his assigned duties and resisted direction from his
superiors. Therefore, this grievance is DENIED.

KEYWORDS: TIMELINESS, UNTIMELY

CASE STYLE: HILL v. DIVISION OF CORRECTIONS/MOUNT OLIVE
CORRECTIONALCOMPLEX
DOCKET NO. 2008-1013-MAPS (11/6/2008)

PRIMARY ISSUES: Whether Grievant is entitled to relief because Respondent mistakenly
rescinded his leave request; whether the grievance was timely.

SUMMARY: Respondent had approved a one-day leave request for Grievant,
then mistakenly rescinded the approval when it "bumped" him in
favor of a more senior employee. However, Grievant knew of the
schedule change 17 days prior to his filing of the grievance, so his
grievance is denied as untimely.